

Supreme Court, U.S.

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In The
Supreme Court of the United States

LAUREN POPOVICH,

Petitioner,

v.

CUYAHOGA COUNTY COURT OF COMMON
PLEAS, DOMESTIC RELATIONS DIVISION,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does Title II of the Americans with Disabilities Act prohibiting discrimination against the disabled in the provision of public services, extend standing to "aggrieved" individuals without a disability who have suffered damage by virtue of their association with a disabled individual who has been the victim of discrimination by a public entity.

LIST OF PARTIES BELOW

The parties herein are those parties listed in the case caption, Lauren Popovich and the Cuyahoga County Court of Common Pleas, Domestic Relations Division.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Lauren Popovich, respectfully prays that a writ of certiorari issue to review the September 27, 2005 Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Sixth Circuit, *Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Division*, Nos. 00-03136 is unreported and is reprinted at App. 1. The decision of the District Court is reprinted at App. 9.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinions and judgments of the U.S. Court of Appeals for the Sixth Circuit of September 27, 2005. The Supreme Court has jurisdiction to review cases from the Court of Appeals under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The pertinent provisions of Article III of the United States Constitution is as follows:

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under

their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

2. Title II of the Americans with Disabilities Act, 42 U.S.C. §12132 provides:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

3. The enforcement provision of Title II of the Americans with Disabilities Act, 42 U.S.C. §12133 provides:

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

4. The Federal Rehabilitation Act's enforcement provision, 29 U.S.C. §794a provides in pertinent part:

* * *

(2) The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 [42 U.S.C. §2000d et seq.] shall be available to

any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

* * *

STATEMENT OF CASE

1. Petitioner, Lauren Popovich, is a citizen of the County of Cuyahoga, State of Ohio. Ms. Popovich was the minor daughter of a Defendant in two domestic relations proceedings in the Cuyahoga County Court of Common Pleas, Domestic Relations Division. Ms. Popovich herself was made a party to the Domestic Relations Proceedings.

2. Aggrieved by the conduct of the Court in failing to provide a reasonable accommodation to his hearing disability, Mr. Popovich filed a charge of discrimination with the Department of Justice. Thereafter, upon insistence by Mr. Popovich that an accommodation be provided, and upon learning that a charge of discrimination had been filed with the Department of Justice, the Court stayed his case, pending the Department of Justice investigation. The Stay was not the result of a Court order but rather a refusal to rule on pending motions, schedule hearings or move the case forward. As a result of the *de facto* stay of proceedings, Mr. Popovich was denied his Constitutional right to Due Process and was prohibited by Court Order to see his daughter for a period of three years under the terms of a Temporary Protective Order. See generally, *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002), *cert. denied*, 537 U.S. 812, 123 S. Ct. 72, 154 L.Ed.2d 15 (2002).

3. Likewise, Petitioner, Lauren Popovich, only the age of 11 was denied the right to see her father without due process of law and on the basis of her father's disability and protected activity.

4. Petitioner Lauren Popovich filed suit on December 19, 2002 alleging violation of Title II of the Americans with Disabilities Act asserting that she had been aggrieved by virtue of the discriminatory conduct of the defendant, and specifically by the Court's conduct in staying proceedings by virtue of her father's request for a hearing accommodation and charge of discrimination filed against the respondent with the Department of Justice. She asserts that she was denied the benefit of her relationship with her father for a period of at least three years by virtue of the discriminatory and retaliatory conduct of the respondent.

5. On May 3, 2004, the United States District Court for the Northern District of Ohio granted a motion to dismiss on the basis that the Plaintiff, though meeting the minimum threshold for standing under Article III of the Constitution, failed to satisfy elements of prudential standing.

6. On September 27, 2005 the United States Court of Appeals for the Sixth Circuit affirmed the decision in a *per curiam* decision concluding that Plaintiff lacked associational standing under Title II of the ADA because she herself was never denied access to any Court Proceedings. Proceedings which the Court refused to schedule on the basis of her father's disability and in retaliation for his protected activity.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

This petition invites the Court to settle an issue of the scope of associational protection provided by Title II of the ADA and the Rehabilitation Act. At issue is whether congress incorporated enforcement language in Title II of the Americans with Disabilities Act, which extends standing to all individuals who are "aggrieved" by the discriminatory conduct of a public entity. The limitation on associational standing espoused by the Appellate Court below arbitrarily restricts claims under Title II in a manner not intended by Congress, and in conflict with the Second Circuit Court of Appeals, prior Sixth Circuit precedent, and this Court's interpretation of identical enforcement language in other civil rights statutes.

In the present case, Plaintiff brought claims for associational discrimination in the provision of public services pursuant to Title II of the Americans with Disabilities Act (ADA) (42 U.S. §§12132 and 12133) and the Federal Rehabilitation Act, 29 U.S.C. §794 as well as claims for retaliation in violation of Title IV of the ADA, 42 U.S.C. §12203. The District Court conducted an analysis of whether petitioner had standing to assert a claim under Title II and Title IV of the ADA based upon her association with her father, himself an alleged victim of disability discrimination and retaliation by the defendant, Court of Common Pleas Domestic Relations Division. The District Court, concluded that Petitioner met the Constitutional standing requirements of Article III, but held that Petitioner failed to alleged facts sufficient to satisfy prudential standing requirements.

Though not using the term "prudential standing", the Sixth Circuit affirmed the decision of the District Court by

essentially concluding that the Plaintiff is not in the zone of protection provided for by the ADA and Rehabilitation Acts prohibition against associational discrimination. In doing so, the Sixth Circuit abrogated over twenty-five (25) years of precedent from this Court as well as the Sixth Circuit itself.

It is clear from the language of the ADA enforcement provisions and federal case law interpreting this language that prudential standing considerations were not applicable herein.

Title II of the ADA states in pertinent part:

... no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. §12132.¹ The applicable enforcement provision of Title II provides that the “remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies,

¹ Though Title II does not expressly provide for prohibitions against associational discrimination, Title I (42 U.S.C. §12112(b)(4)) and Title III (42 U.S.C. §12182(b)(1)(E)) do prohibit such discrimination. The legislative history of the ADA emphasized the intent of Congress that Title II prohibition against discrimination “be identical to those set out on the applicable provisions of Title I and III of this legislation” See *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 47 (2nd Cir. 1997) citing H.R. Rep. No. 485 (II), 101st Congress, Second Session, 84 (1990), reprinted in 1990 U.S.C.A.N. 303, 367. Further, as noted by the court in *Innovative Health Systems*, the implementing regulations of Title II contain prohibition against discrimination against individuals or entities because of their association with individuals with disabilities. *Id.*, citing 28 C.F.R. §35.130(g)

procedures, and rights this subchapter provides *to any person* alleging discrimination on the basis of disability in violation of section 12132 of this title.” (42 U.S.C. §12133) [Emphasis Added] In this regard, Title II of the ADA expressly incorporates the enforcement provisions of the Rehabilitation Act, which provides the “remedies . . . set forth in Title VI of the Civil Rights Act of 1964 . . . to *any person aggrieved* by any act or failure to act by any recipient of federal system or federal provider of a such a systems under §504 of this Act.” 29 U.S.C. §794a(a)(2) [Emphasis Added]

Likewise, the enforcement provisions under Title IV of the ADA, which prohibits retaliation, incorporate the remedies and procedures under Title I, II and III and expressly make these remedies and procedures available to “aggrieved persons”. 42 U.S.C. §12203² It is this enforcement language that prohibits any analysis of prudential standing.

It is well settled that “Congress may, by legislation, expand standing to the full extent permitted by Article III, thus permitting litigation by one ‘who otherwise would be barred by prudential standing rules.’” *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979), citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975).³ In the present

² Standing under Title II and Title IV of the ADA will be treated the same as standing under the Federal Rehabilitation Act as these acts are to be “interpreted consistently with one another” *MX Group*, 293 F. 3d at 332, citing *Andrews v. State of Ohio*, 104 F. 3d 803, 807 (6th Cir. 1997); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F. 3d 725, 731 (9th Cir. 1999); *Innovative Health Systems, Inc. v. City of White Plains*, 117 F. 3d 37, 44-46 (2nd Cir. 1997).

³ Prudential standing is the judicially created limitation on access to the federal courts.

case, Congress has legislatively expanded standing to the full extent permitted by Article III of the United States Constitution. *Innovative Health Systems, Inc. v. City of White Plains*, 117 F. 3d 37, 47 (2nd Cir. 1997); *MX Group, Inc. v. City of Covington* 293 F. 3d 326, 332-335 (6th Cir. 2002).

The Second Circuit Court of Appeals addressed this very issue in *Innovative Health Systems v. City of White Plains*, 117 F. 3d 37 (2nd Cir. 1997).⁴ The District Court in *Innovative Health Systems* cogently stated:

... Title II of the ADA prohibits discrimination on the basis of disability in general terms ... and extends relief to "any person alleging discrimination on the basis of disability". ... By its plain meaning, "any person alleging discrimination ..." need not be an individual with a disability, but ***may be anyone injured by a covered entity's discrimination against an individual on the basis of that individual's disability.*** [Emphasis Added][citations to U.S. Code omitted]

Innovative Health Systems, 931 F. Supp. 222, 236 (S.D. N.Y. 1996). Thereafter, the Second Circuit Court of Appeals expressly affirmed the District Court's rationale on the

⁴ The District Court and Appellate Court attempted to factually distinguish *Innovative Health Systems* by virtue of the fact that it involved the claims of an entity that had been denied permits by virtue of the fact that the entities clientele include individuals with disabilities. The District Court and Appellate Court likewise distinguished the Sixth Circuits holding in *MX Group, Inc. v. City of Covington*, 293 F. 3d 326 (6th Cir. 2002) for identical reasons. However, the facts of the individual case have no application to conclusion by both Courts that "prudential standing" concerns do not apply. See *MX Group* 293 F. 3d at p. 333.

scope of standing pursuant to Title II of the ADA. *Innovative Health Systems*, 117 F. 3d at 47.⁶

Curiously, the Sixth Circuit expressly adopted the rationale of *Innovative Health Systems* in *MX Group, Inc. v. City of Covington* 293 F. 3d 326 (6th Cir. 2002). In this regard, the Sixth Circuit Court of Appeals recognized that “[p]rudential barriers do not apply in all cases.” *MX Group* 293 F. 3d at 332. After recognizing that Congress may legislate to expand standing, the Court engaged in a detailed analysis of rationale set forth in *Innovative Health Systems* on the issue of standing and found “the Second Circuit’s reasoning persuasive.” *MX Group*, 293 F. 3d at 332-335. This reasoning of the Second Circuit Court of Appeals included the fact that congressional intent was to define standing as broadly as permitted by Article III of the United States Constitution. *MX Group*, 293 F. 3d at 333. This very reasoning of the Court was then discarded by the Court as a matter of convenience in this case.

Other District Courts addressing standing under the ADA have likewise concluded that Congress intended that standing be as broad as permitted under Article III of the United States Constitution. See *Liberty Resources, Inc. v. Southeastern Pennsylvania Transportation Authority*, 155 F. Supp. 2d 242, 249-250 (E.D. Pa. 2001) (“Congress

⁶ The Second Circuit Court of Appeals likened the language in Title II of the ADA to the Rehabilitation Act, 29 U.S.C. §794a(a)(2) and concluded that it “evinces a congressional intention to define standing to bring a private action under 504 [and Title II] as broadly as is permitted by Article III of the Constitution.” *Innovative Health Systems*, 117 F. 3d at 47, citing *Innovative Health Systems*, 931 F. Supp. at 237 [remaining citation omitted].

intended that standing under the ADA [and Rehabilitation Act] be limited only by the minimum constitutional constraints of Article III.”).

Though all of the aforementioned cases address the rights of organizations to bring actions under the ADA, the legal analysis of whether prudential standing is a bar to ADA claims is unchanged.

This conclusion has support in cases interpreting similarly broad enforcement language as that contained in both the ADA and the Rehabilitation Act. For example, the United States Supreme Court has held, in the context of §810 of the Fair Housing Act of 1968 the enforcement language granting remedies to “aggrieved persons” demonstrates a congressional intent “to define standing as broadly as is permitted by Article III of the Constitution” *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205, 211-212 (1972) (Tenants challenging discriminatory practices of landlord had standing to sue even though they were not themselves discriminated against because they were damaged having lost the social benefit of living in an integrated apartment complex). The Supreme Court reaffirmed their broad reading of the Fair Housing Act enforcement provisions when considering §812 of the FHA in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979).

The Sixth Circuit has held that the enforcement language of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(b) permitting “a person claiming to be aggrieved” under Title VII to bring an action includes white persons, who themselves had not been the victim of

discrimination. *EEOC v. The Bailey Company*, 563 F. 2d 439, 452 (6th Cir. 1977), *overruled on other grounds*, *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978). More recently, the Third Circuit has held that male employees who were not the direct victims of discrimination had standing to sue for damages, "... even though that discrimination was aimed in the first instance at others ..." *Anjellino v. The New York Times Company*, 200 F. 3d 73, 92 (3rd Cir. 2000).

In each of the foregoing cases, Courts have reaffirmed standing to proceed under various civil rights statutes to individuals, not themselves the victims of discrimination, who have been damaged by the discrimination perpetrated on others. In *Trafficante*, it was the white tenants who were damaged by not being able to associate with non-whites in an integrated apartment. In *The Bailey Company* it was white employees contesting racial discrimination in the workplace; in *Anjellino* it was white males contesting sex discrimination in the work place. The theme remained the same, that there is indirect injury from discriminatory practices that are actionable under the federal civil rights statutes. The enforcement language is no different.

In the present case, there were three parties to the custody proceedings and two victims of the discriminatory practices of the Defendants, Joseph Popovich and his daughter, Lauren Popovich. It is difficult to imagine how the desire of white tenants to live in an integrated apartment building is greater than the desire of a daughter to have a relationship with her father. The damage that a daughter suffers by lack of association with her father dwarfs the damage complained of by the Plaintiff's in

Trafficante, Gladstone, The Bailey Company and Anjellino. The Sixth Circuit has already ruled that a remedy may exist for Joseph Popovich. *Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Division*, 276 F.3d 808 (6th Cir. 2002), *cert. denied*, 537 U.S. 812. A remedy shall likewise exist for Lauren Popovich.

Excluding individuals such as Lauren Popovich from standing to seek a remedy in court is an arbitrary distinction, conveniently reached because a Court was the defendant in this case. Twenty-five years of Supreme Court precedent interpreting identical enforcement language mandates that this Court review the ruling of the Sixth Circuit Court of Appeals that affirmed the District Court's dismissal based solely upon the pleadings.

CONCLUSION

It is respectfully requested that this Court grant this petition.

Respectfully submitted,
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App. 1

150 Fed. Appx. 424

United States Court of Appeals, Sixth Circuit.
Lauren **POPOVICH**, Plaintiff-Appellant,

v.

CUYAHOGA COUNTY COURT OF COMMON PLEAS,
DOMESTIC RELATIONS DIVISION, Defendant-
Appellee.

No. 04-3734.

Sept. 27, 2005.

On Appeal from the United States District Court for the
Northern District of Ohio.

Richard C. Haber, Reminger & Reminger, Cleveland,
OH, for Plaintiff-Appellant.

Bruce B. Elfvin, Barbara Kaye Besser, Elfvin & Besser,
Cleveland, OH, for Defendant-Appellee.

Before KEITH and DAUGHTREY, Circuit Judges;
WILLIAMS,* District Judge.

PER CURIAM.

This litigation arose in the wake of a separate action brought by the father of plaintiff Lauren Popovich, in which he charged a violation of the Americans with Disabilities Act (the ADA), 42 U.S.C. §§ 12111 *et seq.*, and the Rehabilitation Act, 29 U.S.C. §§ 794 *et seq.*, by the defendant in this case, the domestic relations division of the Cuyahoga County (Ohio) Court of Common Pleas. Citing

* The Hon. Glen M. Williams, United States District Judge for the Western District of Virginia, sitting by designation.

Title II of the ADA, which prohibits exclusion from public services on the basis of disability, Joseph Popovich alleged that as a “qualified individual with a disability,” a hearing impairment, he had been denied access to full participation in litigation involving Lauren’s custody when the domestic relations court refused to accommodate his disability by supplying transcription assistance that would permit him to hear the court proceedings. *See Popovich v. Cuyahoga Cty. Court of Common Pleas*, 227 F.3d 627 (6th Cir.2000), *rehearing en banc* 276 F.3d 808 (6th Cir.2002), *cert. denied* 537 U.S. 812, 123 S.Ct. 72, 154 L.Ed.2d 15 (2002). Denied the right to intervene in her father’s ADA action, Lauren Popovich later filed her own lawsuit, alleging that her rights under the ADA had been violated, based on her association with a qualified individual with a disability, Joseph Popovich. Specifically, Lauren claimed that she was injured by delays in the custody litigation, which were caused by the domestic relations court’s failure to accommodate her father’s disability, which in turn deprived her of her father’s companionship for a period of five years. She did not claim that she herself had been denied access to the domestic relations court or its services.

The district court granted the defendant’s motion to dismiss, holding that the plaintiff had failed to establish standing to sue under either the ADA or the Rehabilitation Act. We find no reversible error and affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1992, Lauren Popovich was the subject of a custody suit filed by her mother against her father in the Cuyahoga domestic relations court, the defendant here. By

order of the court, she was named a defendant in the custody case and was appointed a guardian ad litem. In August 1992, during the course of the custody proceeding, the plaintiff's mother filed a second action against Joseph Popovich, charging him with domestic violence. That complaint resulted in the issuance of a protective order, the effect of which, according to the plaintiff, "was to remove [her] from Mr. Popovich's home and to prohibit him from having any contact with her." The protective order was renewed in June 1993 and, the plaintiff now contends, "[a]s a result, Plaintiff/Appellant was not allowed to visit, either supervised or unsupervised, her father from August 1992 until the fall of 1997." Meanwhile, the custody litigation was drawn out for some two years due to a continuing dispute over the court's obligation under the ADA to provide hearing-assistance facilities for the plaintiff's father. The dispute was apparently resolved in 1994, when the Cuyahoga court agreed to provide transcription services for Joseph Popovich.¹

On December 29, 2002, on her 20th birthday and over five years after she resumed her relationship with her father, Lauren Popovich filed suit in federal district court, charging discrimination and retaliation in violation of both Title II of the ADA and the Rehabilitation Act. According to the district court, her claims were "[e]ssentially . . . that the Common Pleas Court refused to accommodate her father . . . during the custody proceedings . . . and as a

¹ Although the custody dispute may have been resolved in state court, the ADA action filed in federal court in 1995 proceeded to trial and resulted in a jury verdict in favor of Joseph Popovich. On appeal, the verdict was set aside and the case was remanded for retrial. See *Popovich*, 276 F.3d at 818. At the time this case was argued, the retrial had not taken place.

result of the court's conduct she was denied access to her father for about five years." She asserted that, as a defendant in the custody case, "she was discriminated against due to her association with her father, an individual with a disability." In response, the defendant moved to dismiss this case, contending, among other defenses, that the plaintiff did not have standing to sue under the ADA and the Rehabilitation Act.

The district court granted the motion to dismiss, holding that although the ADA provides a cause of action for associational discrimination in access to public services, the plaintiff had not alleged that she was "excluded from participation in the services or activities of a public entity because of . . . her association with a disabled person." The plaintiff now appeals that ruling.

The district court also held that the Rehabilitation Act does not contain a provision prohibiting associational discrimination and dismissed that claim as well.

II. DISCUSSION

A. Associational Discrimination under the ADA

As the defendant points out, and as the plaintiff candidly admits, Title II (governing public services) of the ADA—unlike Title I (employment) and Title III (public accommodations) — does not contain an explicit provision prohibiting discrimination by association with a qualified person with a disability.² One could argue, as the defendant

² See Title I, in 42 U.S.C. § 12112(b)(4), defining discrimination to include the "excluding or otherwise denying equal jobs or benefits to a
(Continued on following page)

does here, that this difference in the plain language of the ADA titles reflects a deliberate choice by Congress not to permit an action under Title II for associational discrimination. If accepted, such an argument would foreclose standing to the plaintiff in this case. However, we have previously held that Title II does encompass a prohibition against associational discrimination, adopting the Second Circuit's analysis in *Innovative Health Systems, Inc., v. City of White Plains*, 117 F.3d 37, 46-48 (2d Cir.1997).

In *Innovative Health Systems*, the Second Circuit noted the absence of an express prohibition in Title II's definition and discrimination sections but gave a broad reading to Title II's enforcement provision, 42 U.S.C. § 12133, which extends relief to "*any person* alleging discrimination on the basis of disability." (Emphasis added.) The Second Circuit also noted the existence of regulations implementing Title II, one of which provides that "[a] public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association." 28 C.F.R. § 35.130(g). That regulation, the court pointed out, was intended to incorporate "the prohibitions of discrimination on the basis of association from Titles I and III." *Innovative Health Sys.*,

qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association," and the parallel Title III provision in 42 U.S.C. § 12182(b)(1)(E), making it discriminatory to deny accommodations "to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association."

C.A.6 (Ohio),2005.

117 F.3d at 47, citing H.R.Rep. No. 485(III) at 51 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 474.

We applied the reasoning of *Innovative Health Systems* to a similar fact situation in *MX Group, Inc. v. City of Covington*, 293 F.3d 326 (6th Cir.2002). In both cases, a drug rehabilitation center was denied a zoning permit and brought suit under Title II of the ADA, claiming a denial of rights based on association with qualified individuals with a disability, *i.e.*, recovering drug addicts. In both cases, the reviewing courts found standing to sue on the basis of the plaintiff's association with disabled persons.

Our opinion in *MX Group* is inapplicable to the facts in this case, however, and the plaintiff's reliance on it to establish her standing to sue in this action is misplaced. Unlike the treatment centers in *Innovative Health Systems* and *MX Group*, both of which were denied permits to operate, Lauren Popovich has not been denied access to or participation in any of the public services covered by Title II. In other words, Lauren Popovich – although allegedly deprived of her father's companionship because of delays in her custody case – has not suffered an "ADA injury." It was for this reason that the district court held that the plaintiff had failed to establish standing under Title II, given the fact that her association with her father did not result in her exclusion from the custody proceedings.

The trial judge also noted that the complaint filed in this case alleged that Lauren had been denied her father's companionship for five years *not* as a result of the proceedings in the custody case – indeed, there is no indication in the complaint concerning the outcome of the custody dispute. Instead, the complaint alleges that Lauren was removed from father's home as the result of the *protective*

order issued in a separate case and based on allegations of domestic violence committed against the plaintiff's mother. The complaint further alleges that it was this protective order that prevented the plaintiff from seeing her father for some five years. And although Lauren Popovich echoes her father's criticism that it was "unfair" to issue the protective order in an *ex parte* proceeding and later to renew it over Joseph Popovich's objection, there is no claim that the issuance or enforcement of the protective order violated the ADA in any respect. Hence, there is no causal connection shown on the face of the complaint between the discrimination allegedly suffered by Joseph Popovich and the injury alleged by his daughter.

B. Associational Discrimination under the Rehabilitation Act

Although the plaintiff purported to appeal the district court's ruling on her standing under the Rehabilitation Act, she did not discuss that decision in her brief before this court and, thus, appears to have abandoned her appeal of this issue. We nevertheless note that the district court incorrectly concluded that the Rehabilitation Act does not have an associational discrimination component. In fact, just as Title II of the ADA extends relief to "any person alleging discrimination on the basis of disability," 42 U.S.C. § 12133, the Rehabilitation Act's remedies are available to "any person aggrieved" by discrimination based on disability. 29 U.S.C. § 794a(a)(2). As a result, we noted in *MX Group* that associational discrimination claims are viable under the Rehabilitation Act, just as they are under the ADA. See *MX Group, Inc. v. City of Covington*, 293 F.3d at 332; see also *Andrews v. State of Ohio*, 104 F.3d 803, 807 (6th Cir.1997) (because "standards under

both of the acts are largely the same, cases construing one statute are instructive in construing the other"); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 731 (9th Cir.1999) (noting that Congress has instructed that both acts are to be interpreted consistently).

III. CONCLUSION

For the reasons set out above, we AFFIRM the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LAUREN POPOVICH	:	CASE NO.1:00 CV 3136
	:	
Plaintiff	:	<u>MEMORANDUM OF</u>
	:	<u>OPINION AND ORDER</u>
-vs-	:	<u>GRANTING DEFENDANT'S</u>
CUYAHOGA COUNTY	:	<u>MOTION TO DISMISS</u>
COURT OF COMMON	:	
PLEAS, DOMESTIC	:	
RELATIONS DIVISION	:	
	:	
Defendant	:	

UNITED STATES DISTRICT JUDGE LESLEY WELLS

Plaintiff Lauren Popovich brought this action against the Cuyahoga County Court of Common Pleas of Ohio under the Americans with Disabilities Act (the "ADA")¹ and the Rehabilitation Act² for injuries she allegedly suffered as a result of the defendant's -discrimination against her father Joseph Popovich, who was allegedly hearing-impaired. Before the Court are defendant's Motion to Dismiss or for Summary Judgment, plaintiff's Memorandum in Opposition, defendant's reply, and defendant's supplemental reply. (Docket nos. 39, 44, 46&51.) For the reasons that follow, defendant's Motion to Dismiss will be granted.

¹ 42 U.S.C. § 12111 et. seq.

² 29 U.S.C. § 794, et. seq.

I. FACTUAL AND PROCEDURAL BACKGROUNDS

A. The Complaint:

Plaintiff alleges the following in her Second Amended Complaint (the "Complaint"):

Plaintiff was born on 19 December 1980. (Compl. ¶ 14.) Her father Joseph Popovich was a defendant in two Domestic Relations actions pending before the Cuyahoga County Court of Common Pleas, Domestic Relations Division (the "Common Pleas Court"). The first action (Cuyahoga County Case Number 90DR204505) involved motions for the custody of Lauren Popovich and visitation rights with her (the "custody case"). The second case (Cuyahoga County Case No. 92DR220623) involved a domestic violence complaint filed against Mr. Popovich by, among others, his ex-wife (the "domestic violence case"). Ms. Lauren Popovich was made a defendant in the custody case by virtue of a Common Pleas Court's order dated 21 November 1990. (Compl. ¶¶ 15&16.)

On or around 11 August 1992, Mr. Popovich's counsel informed the Common Pleas Court that Mr. Popovich had hearing difficulties during the custody proceedings. (Compl. ¶¶ 17&18.) An audiologist confirmed and informed Referee Gregory Fuss that Mr. Popovich had a moderate to severe hearing loss, which made an auxiliary aid or service necessary in order to provide effective communications with Mr. Popovich during any proceedings. (Compl. ¶ 24.) Mr. Popovich requested that the Common Pleas Court provide auxiliary aids and services to him during the court proceedings. (Compl. ¶ 20.) The Common Pleas Court provided him with an FM amplification that used a centrally located microphone instead of

the "pass around" microphone recommended by the audiologist. (Compl. ¶¶ 29, 30&35.)

While the custody case was pending, Mr. Popovich's ex-wife filed a petition of domestic violence with the Common Pleas Court on 24 August 1992, requesting an ex parte temporary restraining order against Mr. Popovich. The next morning the Common Pleas Court conducted an ex parte hearing on the petition and issued an order, the effect of which, according to plaintiff, was to remove plaintiff from Mr. Popovich's home and to prohibit him from having any contact with her. (Compl. ¶¶ 25&26.) The Common Pleas Court ordered that a copy of the transcript of the ex parte hearing be provided to Mr. Popovich's counsel in preparation for a full hearing on the domestic violence petition. (Compl. ¶ 27.)

On 27 August 1992, the Common Pleas Court declared a mis-trial on the custody case. The presiding judge voluntarily removed himself from the case "to preclude any impropriety or appearance of a conflict of interest" on his part. The case was re-assigned to Judge Gallagher. (Compl. ¶ 31.)

On or around September 1992, "Plaintiff"³ filed a charge of discrimination with the Department of Justice. Thereafter, Mr. Popovich filed a charge of discrimination on behalf of his minor child Lauren Popovich. (Compl. ¶ 34.)

³ The Complaint sometimes refer to Mr. Popovich as "Plaintiff" even though he is not the plaintiff in the current case. See, e.g., Compl. ¶¶ 37&42. It is likely the "Plaintiff" here refers to Mr. Popovich, not to Lauren Popovich.

From September 2, 1992 until October 23, 1992, Referee Maurice Schoby held hearings on the domestic violence petition. (Compl. ¶ 32.) On October 23, 1992, Mr. Popovich informed Referee Schoby that he was experiencing an ear infection as a result of extended use of the headset provided by the court. He moved for a continuance of 10 days to allow time for his condition to improve. At an attorney's conference on October 29, 1992, Referee Schoby asked Mr. Popovich's attorney to submit a written report from Mr. Popovich's physician on the diagnosis, prescribed treatment and prognosis for Mr. Popovich's ear condition. Referee Schoby further requested an estimate as to when hearings could resume. The deadline for submission of this report was 5 November 1992 and the hearings were continued until 1 December 1992. (Compl. ¶¶ 36-38.) The Common Pleas Court issued an order on 2 November 1992 stating that auxiliary aids and services were required in the ongoing proceedings because of Mr. Popovich's hearing disability. Such auxiliary services were to be provided through the Cleveland Hearing and Speech Center. (Compl. ¶ 39.)

At the 1 December 1992 hearing, Mr. Popovich's counsel requested that the Common Pleas Court immediately reconvene the custody hearing and provide Mr. Popovich with computerized real-time captioning of the court proceedings or some other instantaneous transcription process. In response, Referee Schoby allegedly gave Mr. Popovich two options: "withdraw his motion for a hearing accommodation and . . . [the court] could proceed today with the continued hearing" or Referee Schoby would "schedule a hearing to determine the extent of [Mr. Popovich's] hearing disability and what, if any, accommodations needed to be made for that." Mr. Popovich refused

to withdraw his request for hearing accommodations. The referee scheduled a hearing for 1 February 1993. (Compl. ¶¶ 41-43.)

The Department of Justice Civil Right Section (CRS) notified the Common Pleas Court on 2 December 1992⁴ of Mr. Popovich's charges of discrimination against the Common Pleas Court and the commencement of the CRS' investigation. The Common Pleas Court canceled the 1 February 1993 hearing and refused to conduct any further proceedings pending the completion of the CRS' investigation. (Compl. ¶¶ 44&45.)

On 1 June 1993, Mr. Popovich's ex-wife file a motion requesting that the Common Pleas Court continue the 25 August 1992 temporary restraining order. Judge Gallagher, over Mr. Popovich's objection, extended the order on 16 June 1993. (Compl. ¶¶ 50&51.)

On 12 September 1994, the CRS requested that the Common Pleas Court take corrective action regarding the Popovich matter no later than 23 September 1994. The Common Pleas Court responded on 7 October 1994, stating that it had decided to order real-time transcription services for Mr. Popovich. (Compl. ¶ 55.)

B. Procedural Background

Mr. Popovich brought his disability discrimination claim against the Common Pleas Court on 23 March 1995 at this United States District Court for the Northern District of Ohio. *Joseph Popovich v. Cuyahoga County of*

⁴ The Complaint stated "December 2, 1993," but it is likely 2 December 1992 from the time line of the events alleged in the Complaint.

Common Pleas, case no. 1:95CV684. By consent the case went before Magistrate Judge Gallas and proceeded to a jury trial with a jury verdict of \$400,000 in favor of Mr. Popovich. The Common Pleas Court appealed the jury verdict to the United States Court of Appeals for the Sixth Circuit. While the appeal was pending, plaintiff brought the instant case on 19 December 2000. On the following day, plaintiff filed a motion to stay the case until the Sixth Circuit ruled on the appeal in case no. 1:95CV684. This Court granted the stay.

On 10 January 2002, an en banc Sixth Circuit set aside the jury verdict in case no. 1:95CV684 and remanded the case for retrial on the retaliation and unreasonable exclusion from participation claims. See *Popovich v. Cuyahoga County of Common Pleas*, 276 F.3d 808, 817 (6th Cir. 2002). The Common Pleas Court filed a petition for a writ of certiorari to the United States Supreme Court.

On 25 January 2002, defendant sought further stay in this case until the Supreme Court ruled on its petition for certiorari in Joseph Popovich's discrimination case. Defendant's request was granted by this Court. On 15 October 2002, the parties filed a joint notice that the Supreme Court denied defendant's petitions for certiorari. This Court thus lifted the stay in this case.

In the meanwhile, the remanded case no. 1:95CV684 is still pending before Magistrate Judge Gallas in this district court.

C. PLAINTIFF'S CLAIMS

Plaintiff Lauren Popovich, the child whose custody was in dispute in the underlying custody case out of which

her father's discrimination claims against the Court of Common Pleas arose, brings four causes of action on her own behalf against the Court of Common Pleas: discrimination in violation of Title II of the ADA and the Rehabilitation Act; and retaliation in violation of Title II of the ADA and the Rehabilitation Act.

Essentially, Ms. Popovich claims that the Common Pleas Court refused to accommodate her father, a partially deaf individual, during the custody proceedings regarding her custody, and as a result of the court's conduct, she was denied access to her father for about five years. She asserts that as a defendant in the custody case, she was discriminated against due to her association with her father, an individual with a disability.

III. ANALYSIS

When considering a 12(b)(6) motion for failure to state a claim upon which relief can be granted, a court must:

construe the complaint in the light most favorable to the plaintiff, accept all the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief. . . . However, the Court need not accept as true legal conclusions or unwarranted factual inferences.

Grindstaff v. Green, 133 F.3d 416, 421 (6th Cir. 1998). The Court's task is thus "necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claims." *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

As an initial matter, a litigant must have "standing" to challenge the action sought to be adjudicated in the lawsuit. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). Standing is a threshold inquiry in every federal case. *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 332 (6th Cir. 2002). "This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Valley Forge*, 454 U.S. at 471.

Article III of the United States Constitution, which limits the "judicial power" of the United States to the resolution of "cases" and "controversies," imposes the minimum constitutional requirements of standing. Under these requirements, a plaintiff must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." *Id.* at 472 (citation omitted).

Even when the plaintiff has alleged injury sufficient to meet Article III's requirements, the Supreme Court has also adhered to certain prudential standing principles. One principle is that "the constitutional or statutory provision on which [plaintiff's] claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 499-500. Furthermore, "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.*

In this case, even though Ms. Popovich has met the minimum constitutional requirements,⁵ she has failed to meet the prudential standing requirements because neither Title II of the ADA nor Section 794 of the Rehabilitation Act, on which she grounds her discrimination and retaliation claims, provides relief for persons in Ms. Popovich's position. Furthermore, Ms. Popovich bases her claims on the legal rights of her father instead of her own rights.

1. The ADA – Associational Discrimination

Ms. Popovich, who is not an individual with a disability, brought her claims under associational discrimination theory, provided in 42 U.S.C. § 12112(b)(4), which defines the term "discriminate" as including, among others, "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association."⁶ Explaining

⁵ The injury alleged by Ms. Popovich in her Complaint was "that she was denied access to her father" for five years. According to the Complaint, this alleged injury was caused by the Common Pleas Court's failure to accommodate Mr. Popovich's hearing problems and the resulting delay in the custody case. Taking the allegations in the Complaint as true, as the Court must do in deciding a motion to dismiss, Ms. Popovich has averred that she personally suffered some injury. Viewing the Complaint in the light most favorable to Ms. Popovich, this injury could be traced to the alleged conduct of the Common Pleas Court. This injury could be redressed by an award of damages. Therefore, the minimum standing requirements of Article III are met.

⁶ Even though § 12112(b)(4) is a provision of Title I of the ADA, it is applicable to Title II as well. *MX Group, Inc.*, 293 F.3d at 334, citing *Innovative Health Sys. v. City of White Plains*, 117 F.3d 37, 47 (2d Cir. 1997).

§ 12112(b)(4), Congress gave the following example of "associational discrimination":

Thus, assume, for example that an applicant applies for a job and discloses to the employer that his or her spouse has a disability. The employer believes the applicant is qualified for the job. The employer, however, assuming without foundation that the applicant will have to miss work or frequently leave work early or both, in order to care for his or her spouse, declines to hire the individual for such reasons. Such a refusal is prohibited by this subparagraph.

1990 U.S.C.C.A.N. 343-44, House Report NO. 101-485(II), P.L. 101-336. Section 12112(b)(4), read in the context of Title II of the ADA,⁷ covers a qualified individual who is excluded from participation in the services or activities of a public entity because of his or her association with a disabled person.

Ms. Popovich is not covered under § 12112(b)(4) because the Complaint does not claim that she herself was excluded from the custody proceedings. She alleges that her father, Mr. Popovich, was denied by the Common Pleas Court reasonable accommodations for his impaired hearing, and without the accommodations, her father was unable to participate meaningfully in the custody proceedings, which equaled exclusion from the custody proceedings. She asserts that as a result of this alleged

⁷ Title II of the ADA, 42 U.S.C. § 12132, provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

discriminatory conduct against Mr. Popovich, the custody case was delayed and Ms. Popovich was injured by not being able to be with her father. Even assuming that Ms. Popovich's injury was caused by the alleged discrimination against Mr. Popovich⁸, injury is only one element of a discrimination claim under Title II of the ADA. Injury by itself does not constitute an ADA action. Ms. Popovich must be the qualified individual who herself was excluded from participation in the custody proceeding in order for her to bring an associational discrimination claim under Title II.

Furthermore, Ms. Popovich presented her claim as an ADA claim grounded on due process.⁹ Her Complaint, however, fails to show that Ms. Popovich's due process right was violated. The specific due process right involved here is a right not to be excluded from meaningful participation in the court proceedings. *Popovich*, 276 F.3d at 813. The Complaint is devoid of any allegations that Ms.

⁸ The 24 August 1992 temporary restraining order against Mr. Popovich, which, according to the Complaint, removed Ms. Popovich from Mr. Popovich's home and prohibited him from seeing her, was issued upon Mr. Popovich's ex-wife and others' complaint of domestic violence. This order is the direct causation of Ms. Popovich's claimed injury. Ms. Popovich does not claim that had Mr. Popovich's accommodation request been granted and the custody case gone forward, Mr. Popovich would be granted custody of her or be allowed to see her. Therefore, "but-for" causation is lacking here. See *supra* page 3.

⁹ The Sixth Circuit held in *Popovich*, 276 F.3d at 811, that the Eleventh Amendment to the Constitution bars a plaintiff's ADA action "in so far as the action relies on congressional enforcement of the Equal Protection Clause," but it does not bar an action relying on "congressional enforcement of the Due Process Clause."

After the issuance of this decision, plaintiff amended her complaint to allege violations of her right to due process instead of her right to equal protection.

Popovich was excluded from participation in the custody case. Instead, the main body of Ms. Popovich's Complaint alleges acts done to Mr. Popovich. He, as a partial deaf person without accommodations, was allegedly denied "a reasonable way to participate meaningfully in the proceeding." *Id.* At the very end of the Complaint, Ms. Popovich states that unfortunately she was also injured by the Common Pleas Court's discrimination against Mr. Popovich. However, a proposition that Mr. Popovich was excluded from the custody proceeding and as a result Ms. Popovich was injured does not lead to the conclusion that Ms. Popovich was excluded from the proceeding in violation of her due process rights.

Because Ms. Popovich is not a plaintiff intended by § 12112(b)(4) and she is not asserting her own rights, she lacks standing under the prudential principles of standing.¹⁰ A holding otherwise would open the floodgates of litigation to an extensive group of people whom the Congress did not intend to cover under the ADA.

¹⁰ The cases Ms. Popovich cites in support actually run against her position. In *MX Group, Inc. v. City of Covington*, MX Group was denied a zoning permit to open a methadone clinic to provide treatment and services for recovering opium addicts. The Sixth Circuit held that because MX Group had presented evidence that it had been denied the permit because it cared for and/or was associated with individuals who had disabilities, MX Group had standing to bring the suit on its own behalf. *Id.* 293 F.3d at 328-30. *MX Group* is critically different from the current case because MX Group was the one being denied the building permit while in this case the father of Ms. Popovich, not the minor child, was the person allegedly being discriminated against in the custody proceedings. *Innovative Health Sys.*, 117 F.3d at 47, which holds that an outpatient drug and alcohol rehabilitation center whose application for a zoning permit was denied had standing to bring an action under the ADA, is no help to the plaintiff here either.

2. The Rehabilitation Act

Unlike the ADA, the Rehabilitation Act does not have an associational discrimination provision. Section 794 of the Rehabilitation Act simply provides: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." Because Ms. Popovich is neither disabled nor excluded from participation in the custody proceedings, she is not covered under this provision.

Standing includes "a blend of constitutional requirements and prudential considerations." *Valley Forge*, 454 U.S. at 471. As Ms. Popovich has failed to satisfy the prudential considerations aspect of standing, she lacks standing to bring the current action.

III. CONCLUSION

Because Ms. Popovich has not shown that she has standing to bring this action, this Court lacks judicial power to proceed further in this case.¹¹ Therefore, defendant's Motion to Dismiss is granted. This case is dismissed for lack of standing.

¹¹ Defendant has raised other arguments in its Motion to Dismiss. Because the Court has found that plaintiff has failed to show that she has standing to bring this action, there is no need for the Court to address those arguments.

App. 22

IT IS SO ORDERED.

/s/ Lesley Wells
UNITED STATES DISTRICT JUDGE

United States Constitution
Article III, Section 2, clause 1

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

42 U.S.C. § 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Current through P.L. 109-127 approved 12-07-05

42 U.S.C. § 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging

discrimination on the basis of disability in violation of section 12132 of this title.

Current through P.L. 109-127 approved 12-07-05

29 U.S.C. 794a

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

2)
No. 05-835

**In the
Supreme Court of the United States**

LAUREN POPOVICH,

Petitioner,

v.

COMMON PLEAS COURT OF CUYAHOGA COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS,
Respondent.

**On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Sixth Circuit**

**RESPONSE IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED FOR REVIEW

Petitioner Lauren Popovich presents the following question seeking review by this Court:

Does Title II of the Americans with Disabilities Act prohibiting discrimination against the disabled in the provision of services, extend standing to “aggrieved” individuals without a disability who have suffered damage by virtue of their association with a disabled individual who has been the victim of discrimination by a public entity.

LIST OF PARTIES BELOW

The parties herein are those parties listed in the case caption, Lauren Popovich and the Cuyahoga County Court of Common Pleas, Domestic Relations Division.

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No. 05- 835
SUPREME COURT OF THE UNITED STATES
October Term, 2005

LAUREN POPOVICH,
Petitioner,

v.

CUYAHOGA COUNTY COURT OF COMMON PLEAS,
DIVISION OF DOMESTIC RELATIONS,
Respondent.

Response and Opposition to Petition For
A Writ Of Certiorari To The United States
Court Of Appeals For The Sixth Circuit

Respondent prays that the Writ of Certiorari sought by
Petitioner, Lauren Popovich, be denied.

STATEMENT OF THE CASE

1. In August, 1990 Petitioner, Lauren Popovich, became the subject of a post decree custody dispute filed by her mother against her father in the Cuyahoga County Court of Common Pleas, Division Of Domestic Relations ("State Court").

2. By order of the State Court, she was named a party in the custody case and was appointed a guardian *ad litem*.

3. In August, 1992, Petitioner's paternal grandparents, paternal aunt and mother filed a second action against her father, Joseph Popovich, alleging domestic violence. The State

Court, after a hearing, issued an order¹ placing Petitioner with her paternal aunt and forbidding her father from having any contact with her. This order was renewed in 1993.

4. Petitioner's father claimed hearing disabilities under Title II of the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. § 12132 and sought hearing-assistance devices from the State Court. Disputes on the extent of the State Court's obligations led to the custody and domestic violence hearing being drawn out for several years. Petitioner claims that as a result of the State Court orders, she was not allowed to see her father from 1992 until 1997².

5. On December 29, 2002, Petitioner's 20th birthday, she filed suit in federal court, claiming discrimination and retaliation in violation of Title II of the ADA and the Rehabilitation Act, 29 U.S.C. § 794, *et seq.* Specifically, Petitioner alleged that the State Court's refusal to accommodate her father during the custody proceedings denied her access to him for five years, resulting in her sustaining damage.

6. Petitioner claimed "she was discriminated against due to her association with her father, an individual with a disability."

7. The State Court successfully moved to dismiss, arguing

¹ The temporary protection order issued would expire in one year in the absence of a permanent order in the proceeding.

² An order was entered in October of 1994 directing visitation, but for a variety of reasons Petitioner's father did not make any arrangements to exercise his rights to visitation.

inter alia that Petitioner did not have standing to sue under the ADA or the Rehabilitation Act and that her claims, sounding in equal protection, were barred by the Eleventh Amendment of the Constitution of the United States.

8. On appeal to the United States Court of Appeals for the Sixth Circuit, the dismissal was affirmed.

SUMMARY OF THE ARGUMENT

Petitioner seeks review of the question of whether Title II of the ADA allows standing to a non-disabled litigant, based on associational rights. However, the factual record in this case is incomplete and in dispute. Because the factual record is insufficiently developed, it will not support review by this Court. If the Petition were granted, a closer review by this Court would likely result in a "dismissal as improvidently granted."

The Petition presents **no** precedent-setting error. Petitioner's district court pleadings, arguments to the Sixth Circuit and Question Presented to this Court all sound in Equal Protection. There is no dispute within the Sixth Circuit or among the Circuits as to the viability of this type of claim. This Court has held that Title II of the ADA abrogates Eleventh Amendment immunity for the class of cases implicating access to the courts under Due Process. Respondent enjoys Eleventh Amendment immunity for Equal Protection claims based on Title II of the ADA.

ARGUMENT

1. THE RECORD IS NOT COMPLETE AND MATERIAL FACTS REMAIN UNDETERMINED

Generally, this Court is not disposed to decide constitutional issues when the parties have not provided a complete record. *Bd. Of Trustees v. Garrett*, 531 U.S. 356, 360 (2001). Petitioner presents no significant reason to depart from this position.

A. The Petition, Including The Question Presented For Review, Contains Misstatements Of Fact

Seminal to consideration of the Question Presented is the accuracy of the factual assertions upon which it relies. In Petitioner's single Question there are four factual misstatements which are outcome determinative.

The Question Presented asks whether the ADA extends standing to "aggrieved" individuals. Without a judicial determination of any kind, by any court, the statement suggests that Petitioner was herself aggrieved. There is no record evidence which confers or supports the inference that Petitioner enjoys the status of "an aggrieved individual." Petitioner, who is not disabled, conceded in the Sixth Circuit that her claim was entirely based upon discrimination alleged to have been committed against her father.

The second misstatement is the conclusory manner in which the Question Presented and the argument inappropriately characterizes Petitioner. The Question Presented is premised on the Petitioner having been injured herself. The Question's

use of the phrase, “individuals without a disability who **have suffered damage....**” (Emphasis added) is again a reference to Petitioner. The record is devoid of any evidence that Petitioner sustained any harm or injury, let alone damage.

Central to the consideration of the Question Presented are the third and fourth factual misstatements. Despite the lack of an evidentiary underpinning, Petitioner refers to her father as “a disabled individual.” It is then just a short trip for Petitioner to consider him “the victim of discrimination.” In one fell-swoop Petitioner confers the status of a disabled injured victim on her father. These attributes are not so lightly conferred and cannot be supported by Petitioner’s mere assumptions. The critical question of whether Petitioner’s father was disabled remains unresolved. The Petitioner by-passes the important step of presenting facts to establish that her father: (1) was disabled within the meaning of the ADA; and (2) was a victim of discrimination. As of this date, neither of Petitioner’s assertions are determined fact. This omission makes review by this Court ill advised. As this Court has just recognized, lower courts are in the best position to determine, in the first instance, factual matters. *United States v. Georgia*, __U.S.__, 2006 U.S. LEXIS 759 (January 10, 2006).

B. The Incomplete Factual Record Precludes An Appropriate Review Of The Question Presented

The Question Presented uses the constitutional requirement of “standing” as a focal point. However, upon closer analysis it is apparent that the record lacks the factual underpinnings necessary to properly consider the issue of standing. If the

relationships of the parties to each other, to the statute in question, and to injuries sustained are not accurately set out in the Question Presented, this Court cannot determine whether Petitioner is in the zone of protection intended by the statute or whether she has standing to sue.

The Question Presented is meaningless if the key operative facts are removed as misstatements or erroneous; what remains is not capable or worthy of consideration by this Court. Even if review is granted, a closer review of the record would reveal defects resulting in a dismissal of the case. This can be avoided if the Writ is denied.

2. THE QUESTION PRESENTED FRAMES AN EQUAL PROTECTION REVIEW WHICH IS BARRED BY THE ELEVENTH AMENDMENT

Petitioner's Equal Protection challenge seeking money damages against the State Court under Title II of the ADA is barred by the Eleventh Amendment. *Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978 (2004). Petitioner may only challenge exclusion from participation in a proceeding, on the basis of a disability, if guaranteed by the Due Process Clause of the Fourteenth Amendment. *Goodman, supra.*; *Robinson v. University of Akron School of Law*, 307 F.3d 409, 413 (6th Cir. 2002).

The Question Presented for Review sets forth no facts suggesting either substantive or procedural due process claims, or another constitutional basis. Petitioner makes no claim that she was excluded from any judicial proceeding or denied any

due process rights because of any disability - hers or anyone else's. In fact, the Question Presented is permeated with hard-core, traditional Equal Protection language.

The pleadings of record reflect only Petitioner's Equal Protection arguments which anchor Petitioner's claim.³ Petitioner argues that other subjects of custody disputes, whose fathers are not physically impaired or who have not filed charges with Department of Justice receive prompter disposition of their cases. This is a classic Equal Protection allegation. *Robinson*, 307 F.3d at 413. Such claims are barred against Respondent by the Eleventh Amendment. *Carten v. Kent State University*, 282 F.3d 391, 395 (6th Cir. 2002).

Further evidencing Petitioner's lack of standing to raise this matter before this Court is found in the "right" she is seeking to protect. Petitioner has no constitutional right to a speedy trial in a civil matter. *Koller v. Richardson-Merrell, Inc.*, 737 F.2d 1038, 1050 (D.C. Cir. 1984) (In civil cases there is no equivalent to the constitutional right to a speedy trial). Accordingly, Petitioner was "not actually denied constitutional rights" thus leaving her with no due process claim which she can properly assert. *Goodman, supra*.

The precedents relied upon by Petitioner are inapplicable to her claims and argument. She was not discriminated against

³ The Second Amended Complaint, merely inserts the words "due process" in a few paragraphs. There are no facts alleged which state a due process claim. *Compare*, Complaint, ¶1 with Second Amended Complaint, ¶1.

because of her father's claimed disability. And, no discrimination is claimed against Petitioner, yet she seeks monetary damages. According she lacks the requisite status to bring this issue before this Court.

CONCLUSION

For these reasons, Lauren Popovich's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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January, 2006

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No. 05-835

Supreme Court, U.S.
FILED

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**In The
Supreme Court of the United States**

— ♦ —
LAUREN POPOVICH,

Petitioner,

v.

**CUYAHOGA COUNTY COURT OF COMMON
PLEAS, DOMESTIC RELATIONS DIVISION,**

Respondent.

— ♦ —
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

— ♦ —
**REPLY IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI**

— ♦ —
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ARGUMENT

1. AN INCOMPLETE FACTUAL RECORD DOES NOT BAR ACCEPTANCE OF A PETITION FOR A WRIT OF CERTIORARI

Respondent argues that certiorari is inappropriate due to the incomplete factual record in this case. Specifically, Respondent suggests that Petitioner prematurely concludes that Petitioner was "an aggrieved individual" under the terms of the Americans with Disabilities Act ("ADA") and that the Petitioner "suffered damage." See Respondent's *Response in Opposition to Petitions for Writ of Certiorari* at 4-5. In the same vein, Respondent disputes Petitioner's statement that her father was "disabled" and the "victim of discrimination." *Id.* at 5.¹ Of course, Respondent's attempt to use the incomplete nature of the factual record as a weapon to argue against a grant of certiorari reveals a complete misunderstanding as to the procedural posture of this litigation. Quite simply, an inquiry into the factual record is unnecessary when reviewing a case decided on the legal issue of prudential standing.²

¹ Notably, Respondent points to no evidence or judicial determination that would support its claim that Petitioner misstates the factual record before this Court.

² Viewed most generously, Respondent's argument regarding the factual incompleteness of the record before the Court may be an attempt to dispute Petitioner's Article III standing. However, this line of argument is unavailing under the explicit ruling of the United States District Court for the Northern District of Ohio:

The injury alleged by Ms. Popovich in her Complaint was "that she was denied access to her father" for five years. According to the Complaint, this alleged injury was caused by the Common Pleas Court's failure to accommodate Mr. Popovich's hearing problems and the resulting delay in the custody case. *Taking the allegations in the Complaint as true,*

(Continued on following page)

As noted in Petitioner's brief, Petitioner is seeking review by this Court after her lawsuit was dismissed by the United States District Court for the Northern District of Ohio on the grounds that Petitioner lacked prudential standing. See Petitioner's *Petitions for a Writ of Certiorari* at 4, ¶ 5. In ruling upon a motion to dismiss, "both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197 (1975) (internal citations omitted). Thus, at this stage in the proceedings it is unnecessary, if not improper, for a court to consider issue of fact.

To demand that Petitioner prove the elements of her case at this point is to put the cart before the horse. Should certiorari be granted in this case, this Court will decide whether Petitioner has standing under Article II of the ADA. If this Court were to rule in favor of the Petitioner, the Petitioner's case would be remanded to the district court with instructions that discovery be conducted and a trial held. It is at that trial, and not before, that the issues of fact should be decided. Accordingly, Respondent's suggestion that "the record lacks the factual underpinnings necessary to properly consider the issue of

as the Court must do in deciding a motion to dismiss, Ms. Popovich has averred that she personally suffered some injury. Viewing the Complaint in the light most favorable to Ms. Popovich, this injury could be traced to the alleged conduct of the Common Pleas Court. This injury could be redressed by an award of damages. Therefore, the minimum standing requirements of Article III are met.

See Memorandum of Opinion and Order Granting Defendant's Motion to Dismiss, May 3, 2004, at fn. 5. (Emphasis added).

standing” lacks merit and is incongruent with the procedural posture of this case.

2. THE QUESTION PRESENTED IS NOT BARRED BY THE ELEVENTH AMENDMENT.

Respondent argues that Petitioner’s brief frames the question presented as one requiring an equal protection analysis and this Court has previously held that an “[e]qual [p]rotection challenge seeking money damages against the State Court under Title II of the ADA is barred by the Eleventh Amendment.” *See Respondent’s Response In Opposition To Petition For Writ of Certiorari* at 6 (citing *Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978 (2004)). Respondent’s argument is unavailing on two distinct grounds.

A. Petitioner’s Complaint Adequately Alleged Due Process Violations Which Resulted In Damage to Petitioner.

Respondent argues, that the Question Presented “is permeated with hard-core, traditional Equal Protection language.” *See Respondent’s Response In Opposition To Petition For Writ of Certiorari* at 7. Missing from Respondent’s analysis however, is the fact that Petitioner has properly alleged the existence of due process violations, the result of which was injury to Petitioner. Specifically, Petitioner’s complaint lays out the ways in which Respondent stayed and otherwise delayed Mr. Popovich’s custody hearing, thereby denying him a meaningful opportunity to be heard due to his disability and in retaliation for his efforts in seeking a reasonable accommodation. *See Petitioner’s Second Amended Complaint*.

Within the past two years, this Court has once again recognized that “access to the courts” represents a fundamental right guaranteed by the due process clause. *Tennessee v. Lane*, 541 U.S. 509, 533-534, 124 S.Ct. 1978 (2004). Indeed, it is well understood that the Fourteenth Amendment’s due process guarantee requires that all individuals be provided “the opportunity to be heard at a meaningful time and in a meaningful manner.”³ *City of Los Angeles v. David*, 538 U.S. 715, 716, 123 S.Ct. 1895 (2003) (internal quotations and citations omitted). Further, this Court has recognized that the very nature of a child custody proceeding involves due process rights that should be protected with acute vigilance. *Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18, 27, 101 S.Ct. 2153 (1981) (in a child custody case “the State has an urgent interest in the welfare of the child . . . [and] in an accurate and just decision.”); Clearly then, the “termination or alteration of parental rights requires procedural safeguards under the Due Process Clause . . .” *Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Div.*, 276 F.3d 808, 813-814 (6th Cir. 2002) (citing *Lassiter*, *supra*, 452 U.S. at 27, 101 S.Ct. 2153). On the basis of these precedents, it is apparent that Petitioner’s father was denied due process as a result of Respondent’s actions which resulted in the denial of his opportunity to “be heard at a meaningful time and in a meaningful manner.”

³ It is this due process right to a hearing at a meaningful time and in a meaningful manner upon which Petitioner bases her claim, not, as Respondent suggests, the right to a “speedy trial.” See Respondent’s *Response in Opposition to Petition for Writ of Certiorari* at 7.

This Court's precedents also establish that Petitioner herself was entitled to due process protections during the pendency of the child custody case. Specifically, this Court has historically recognized that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388 (1982) (internal citations omitted). In this case, Petitioner's freedom to choose to live with, let alone visit, her father was denied due to Respondent's treatment of her father. Thus, as a result of Respondent's actions, Petitioner was denied due process and suffered an injury as a result.

In sum, Petitioner has alleged facts that, if proven, would be sufficient to establish that Respondent denied Petitioner's father his due process on the basis of his disability and/or his actions in seeking a reasonable accommodation and in turn denied Petitioner due process by preventing a resolution to a child custody case in which she, more than any other litigant, was affected. Having alleged an actual violation of the Fourteenth Amendment, Plaintiff has alleged sufficient facts to maintain a claim under Title II of the ADA. *United States v. Georgia*, ___ U.S. ___, 2006 U.S. Lexis 759 at **13. Accordingly, Respondent is not immune from suit under the Eleventh Amendment.

B. Recent Precedent Suggests That Respondent Is Not An Arm Of The State And Therefore Not Immune From A Suit Seeking Money Damages On Equal Protection Grounds.

Though it is unnecessary for this Court to address the issue, the Respondent herein is not an arm-of-the-state. Eleventh Amendment immunity from suit extends to

States and state officials "in appropriate circumstances . . . but does not extend to counties and similar municipal corporations. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568 (1977). In order to enjoy the immunity inherent in the Eleventh Amendment, Respondent must establish that it is an "arm-of-the-state." See *Regents of the University of California v. Doe*, 519 U.S. 425, 429-430, 117 S.Ct. 900 (1997) (internal citations omitted). On the basis of the United States Supreme Court's ruling in *Regents of the University of California*, *supra*, the Sixth Circuit Court of Appeals recently revisited the question of the criteria to be considered when determining whether an entity qualifies as an "arm-of-the-state."⁴

In *Regents of the University of California* this Court stated that when conducting an arm-of-the-state analysis, it is of "considerable importance" whether a judgment would be enforceable against the state treasury. *Id.* at 430. This analysis was consistent with previous Supreme Court precedent, *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 48, 115 S.Ct. 394 (1994) ("the vulnerability of the State's purse [is] the most salient factor in Eleventh Amendment determinations"), and has been recognized and incorporated in Sixth Circuit precedent. *Brotherton v.*

⁴ Just prior to this Court's decision in *Regents of the University of California*, the Sixth Circuit considered whether a county court could be considered an arm of the state in *Mumford v. Basinski*, 105 F.3d 264 (6th Cir. 1997). In *Mumford*, the Sixth Circuit found that Ohio's county courts must be considered arms-of-the-state because they are created by Ohio Constitution and state statute. *Id.* at 268-270. Subsequently, in *Alkire v. Irving*, 330 F.3d 802 (6th Cir. 2003), the Sixth Circuit recognized that in deciding *Regents of the University of California* as it did "the Supreme Court has taken apart the foundation of our decision in *Mumford* since it was decided." *Id.* at 811.

Cleveland, 173 F.3d 552, 560-561 (6th Cir. 1999) (recognizing that a state's financial responsibility is the primary factor, if not the only one, to be considered in performing an arm-of-the-state analysis).

The Sixth Circuit recently took up the arm-of-the-State issue again in *Ernst v. Rising*, 427 F.3d 351 (6th Cir. 2005) (en banc). In *Ernst*, the plaintiffs brought a class action lawsuit against the retirement system for state judges, as well as several officials responsible for the administration of that system. *Id.* at 354-355. In deciding the case, the Sixth Circuit found that the state retirement system for judges *was* an arm-of-the-state. *Id.* at 359. The court's analysis considered several factors. However, the primary factor considered by court was whether the state would ultimately be liable to plaintiffs for any judgment rendered against the judicial retirement system. *Id.* at 359-360. On the basis of Michigan statute, the Court found that the state treasury would be responsible for any judgment that exceeded the financial reserves of the retirement system and that the retirement system therefore had to be considered an arm-of-the-state. *Id.* (citing Mich. Comp. Laws § 38.2302(1)).

Applying these cases, Ohio statute makes it clear that a county court of common pleas is not an arm-of-the-state. Specifically, Ohio Rev. Code § 307.01 (2005) provides that the board of county commissioners is required to appropriate funds "reasonably necessary for its operations" to the county court of common pleas. In addition, if a board of county commissioners fails to appropriate sufficient funds, the statute authorizes the court of common pleas to pursue a mandamus action in the county court of appeals to require the appropriation of funds sufficient "to meet all the administrative expenses of the court." *Id.* On the basis

of this statute, it is apparent that the county government, not the State of Ohio, would ultimately be responsible for any judgment rendered against Respondent in this case. Accordingly, because the state does not have any financial exposure arising from a potential judgment against Respondent, Respondent is not entitled to immunity from suit under the Eleventh Amendment.

Nevertheless, this court need not consider this issue because Respondent did not argue for the application of Eleventh Amendment sovereign immunity when this case was in front of the Sixth Circuit Court of Appeals. See Sixth Circuit Proof Brief of Defendant-Appellee Cuyahoga County Court of Common Pleas, Domestic Relations Division, filed October 4, 2004. Indeed, Eleventh Amendment precedent was not applied by the Sixth Circuit when it decided to affirm the trial court's ruling. See *Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Div.*, 150 Fed. Appx. 424 (6th Cir. 2005). Accordingly, the Eleventh Amendment question that Repondent's fervently seek to introduce is not properly before the court. See *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 233, 74 S.Ct. 505 (1954) (the United States Supreme Court "will not undertake to review what the court below did not decide.")

CONCLUSION

For these reasons, it is respectfully requested that Lauren Popovich's Petition for a Writ of Certiorari be granted.

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